request, though several times made; that the defendant had failed, when the phone was installed in the storehouse, to put in a fuse block, an appliance in common use, which was intended to and did prevent the flow of electricity when unduly heavy, and the consequent damages resulting therefrom; that on the night of the fire there was trouble with the phone, of which the defendant had notice. The conduct and admissions of the president and general manager of the defendant at and about the time of the fire tended to show that they believed that the phone was the cause of the fire, as did the statement of the electrician of the Southeastern Tariff Association, who represented 50 or more insurance companies, and was sent to the scene of the fire to examine into its origin. There is no evidence in the cause which shows that it was reasonably probable that the fire originated in any other manner.

There is sufficient evidence to sustain the verdict of the jury, whether they based it upon one or both counts of the declaration.

We are of opinion that the judgment complained of should be affirmed.

Affirmed.

HARLOW'S ADM'R *v.* CHESAPEAKE & O. RY. CO.

Nov. 19, 1908.

[62 S. E. 941.]

1. Railroads (§ 358*)—Injuries to Persons on Track—Care Required as to Licensees.—A railroad company does not owe the duty of previous preparation for the protection of a bare licensee upon its track or roadbed, as such licensee takes upon himself all ordinary risks attached to the place and the business carried on there.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

2. Railroads (§ 398*)—Injuries to Persons on Track—Sufficiency of Evidence.—Evidence in an action against a railroad company for the death of plaintiff's intestate by a passing train while walking by the side of defendant's track held insufficient to show notice to the railroad company that the steps of one of its railroad coaches were so loose that they could swing out and strike a person walking by the side of the track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 398.*]

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

Appeal from Circuit Court, Augusta County.

Action by the administrator of Albert F. Harlow against the Chesapeake & Ohio Railway Company. Demurrer to plaintiff's evidence was sustained, and an appeal taken. Affirmed.

Timberlake & Nelson and *Chas. & Duncan Curry,* for appellant.
Robert L. Parrish, for appellee.

HARRISON, J. This action was brought to recover damages for the death of the plaintiff's intestate, caused, as alleged, by the negligence of the Chesapeake & Ohio Railway Company. A demurrer to the evidence by the defendant company was sustained, and judgment rendered in its favor. To that judgment this writ of error was awarded.

On the 9th of August, 1906, about 10 o'clock at night, the dead body of Albert F. Harlow, 19 years of age, was found lying on the right of way of the defendant company a short distance beyond Augusta Springs, a station about 20 miles west of Staunton. The skull of deceased was crushed back of the left ear and his neck broken. A short distance west of the point where the body was lying, a part of a set of passenger coach steps was found. Shortly before the body of the deceased was discovered, between half past 9 and 10 o'clock, the through passenger train, limited, going west from Jersey City to Cincinnati, passed the point in question, running from 35 to 40 miles an hour. It was a dark night and a slight rain falling. The theory of the plaintiff is than the deceased was walking from the Augusta Springs station, west, to his home, which was near the railroad, and that the steps of the car were loose, and negligently allowed to swing out from the side of the car: that these steps, thus swinging out, struck the deceased as the train passed, and caused his death.

The record shows that the relation of the deceased to the defendant was that of a bare licensee; he, together with others, having used the right of way at that point as a walkway from their homes to the station, with the knowledge and acquiescence of the company.

It is properly conceded that a railroad company does not owe the duty of prevision or previous preparation for the protection of a bare licensee upon its track or roadbed. Williamson *v.* Southern Ry. Co., 104 Va. 146, 51 S. E. 195, 70 L. R. A. 1007, 113 Am. St. Rep. 1032.

A bare licensee is only relieved from the responsibility of being a trespasser, and takes upon himself all ordinary risks attached to the place and the business carried on there. N. & W. Ry. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

It is, however, contended that the defendant company had ac-

tual knowledge that the steps in question were broken and loose when the train passed Staunton, Va., 20 miles east of the point where Harlow was killed, and that this notice was sufficient to put the defendant on its guard to use ordinary care to protect the deceased, and not to injure him at a point where he might reasonably be expected to be on its roadbed. In support of this contention, the evidence of three witnesses is relied on. The first is the testimony of Samuel Critzer, who says that when the train passed Basic City, a station 13 miles east of Staunton, he saw something like a plank, or it might be steps, sticking out about 2 feet from the car. The second is the testimony of Tim Kennedy, who was on the platform at Staunton, and says that he did not notice that the steps struck out from the coach, but that he saw the conductor shake them, and kick them into position. The third is the evidence of John McCauley, who says that he was on the platform at Staunton, and saw the steps sticking out about one foot, and that the conductor kicked it back with his foot, and "stuck his hand inside the step like he was screwing up a bolt or something or other."

There is nothing in the testimony of the Basic City witness to bring home to the defendant the slightest knowledge that the steps were out of order. This was a dark night. As already stated, the train was a through passenger train going west from Jersey, City to Cincinnati. It made but few stops—one at Charlottesville, a divisional point 40 miles east of Staunton. The uncontradicted evidence is that the train was inspected at Charlottesville and everything reported to be in order. The evidence of the two Staunton witnesses is positively denied by the conductor and others, who testify that a number of persons alighted over the steps in question that night at the Staunton station. Placing the coach at the point where it is put by these two witnesses, it is difficult to understand how they could have seen what they claim through a high iron railing from the position in which they place themselves. Accepting, however, their evidence as true, we are of opinion that it fails to bring home to the defendant company notice that the steps were sufficiently out of order to be a menace to any one who might be on its right of way. The result of the evidence of these two witnesses is that, if the steps were out of order at Staunton, the trouble was remedied by the conductor before leaving Staunton in such manner as to satisfy him that no danger to any one was to be apprehended therefrom. This was all that an ordinarily prudent man could do, and therefore no liability can attach to the defendant for the death of the plaintiff's intestate, assuming that he was killed by the steps while walking on the railroad right of way, which is not clear from the evidence.

The judgment of the circuit court, sustaining the demurrer to the evidence, is without error, and must be affirmed.

Affirmed.

Note.

The hopeless conflict between the decisions in this state as to the degree of care due licensees and trespassers by railroad companies, is pointed out by Robert W. Withers in a learned article in 12 Va. Law Reg. 419. The principal case recognizes in terms a distinction between the duty owing to trespassers and bare licensees, which Mr. Withers says was the doctrine of former decisions in Virginia.

DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

N. M. MATTHEWS & CO. *v.* PROGRESS DISTILLING CO.

Nov. 19, 1908.

[62 S. E. 924.]

Appeal and Error (§ 1195*)—Time of Taking Proceedings—Finality of Decision.—Proceedings were instituted by creditors to ascertain the liens against their common debtor, the order of their priority, and to subject his property to their payment. An exception was filed to the report of the commissioner which was sustained by the court, and an appeal taken. The Supreme Court reversed the decree of the lower court, and pronounced the decree which should have been pronounced below, and the case was remanded for further proceedings. Held, that the decision of the Supreme Court was final and imparted finality to the decision of the court below on the expiration of the period within which under the rules of the Supreme Court a petition to rehear could be filed, and a petition to review the judgment of the lower court must be brought within one year after the allowance of the final decree as provided by Code 1904, § 3435.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1195.*]

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.